U.S. Department of Homeland Security
U.S. Citizenship and Immigration Services
Administrative Appeals Office (AAO)
20 Massachusetts Ave., N.W., MS 2090
Washington, DC 20529-2090

U.S. Citizenship and Immigration Services

(b)(6)

DATE: JUN 05 2013 OFFICE: TEXAS SERVICE CENTER FILE:

IN RE: Petitioner:
Beneficiary:

PETITION: Immigrant Petition for Alien Worker as a Member of the Professions Holding an Advanced Degree or an Alien of Exceptional Ability Pursuant to Section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2)

ON BEHALF OF PETITIONER:

INSTRUCTIONS:

Enclosed please find the decision of the Administrative Appeals Office in your case. All of the documents related to this matter have been returned to the office that originally decided your case. Please be advised that any further inquiry that you might have concerning your case must be made to that office.

If you believe the AAO inappropriately applied the law in reaching its decision, or you have additional information that you wish to have considered, you may file a motion to reconsider or a motion to reopen in accordance with the instructions on Form I-290B, Notice of Appeal or Motion, with a fee of $630. The specific requirements for filing such a motion can be found at 8 C.F.R. § 103.5. **Do not file any motion directly with the AAO.** Please be aware that 8 C.F.R. § 103.5(a)(1)(i) requires any motion to be filed within 30 days of the decision that the motion seeks to reconsider or reopen.

Thank you,

Ron Rosenberg
Acting Chief, Administrative Appeals Office

DISCUSSION: The Director, Texas Service Center (director), denied the employment-based immigrant visa petition. The petitioner appealed the decision to the Administrative Appeals Office (AAO). The director's decision will be withdrawn. The petition will be remanded.

The petitioner describes itself as a gas station/convenience store. It seeks to permanently employ the beneficiary in the United States as a market research analyst. The petitioner requests classification of the beneficiary as a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to section 203(b)(2) of the Immigration and Nationality Act, 8 U.S.C. § 1153(b)(2) (the Act).[1]

The petition is accompanied by an ETA Form 9089, Application for Permanent Employment (labor certification), certified by the U.S. Department of Labor (DOL). The priority date of the petition, which is the date the DOL accepted the labor certification for processing, is May 6, 2011. *See* 8 C.F.R. § 204.5(d). The director's decision denying the petition concludes that the petitioner has not established that a *bona fide* job offer exists.

The record shows that the appeal is properly filed and makes a specific allegation of error in law or fact. The procedural history in this case is documented by the record and incorporated into the decision. Further elaboration of the procedural history will be made only as necessary. The AAO conducts appellate review on a *de novo* basis. *See Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004). The AAO considers all pertinent evidence in the record, including new evidence properly submitted upon appeal.[2]

According to the Form I-140, signed by the petitioner on September 7, 2011, the petitioner was established in 2007 and employs three workers. The petitioner states on the Form I-140 that the proffered position of market research analyst is not a new position. Noting the size and nature of the petitioner's business, the director issued a request for evidence on March 8, 2012, asking the petitioner to provide an organizational chart; a list of employees, their duties and schedule; the hours of operation of the petitioner and evidence that the petitioner has sufficient office space for the

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[1] In pertinent part, section 203(b)(2) of the Immigration and Nationality Act (the Act), 8 U.S.C. § 1153(b)(2), provides immigrant classification to members of the professions holding advanced degrees or their equivalent and whose services are sought by an employer in the United States. An advanced degree is a United States academic or professional degree or a foreign equivalent degree above the baccalaureate level. 8 C.F.R. § 204.5(k)(2). The regulation further states: "A United States baccalaureate degree or a foreign equivalent degree followed by at least five years of progressive experience in the specialty shall be considered the equivalent of a master's degree. If a doctoral degree is customarily required by the specialty, the alien must have a United States doctorate or a foreign equivalent degree." *Id.*

[2] The submission of additional evidence on appeal is allowed by the instructions to the Form I-290B, which are incorporated into the regulations by 8 C.F.R. § 103.2(a)(1). The record in the instant case provides no reason to preclude consideration of any of the documents newly submitted on appeal. *See Matter of Soriano*, 19 I&N Dec. 764 (BIA 1988).

beneficiary to perform her job duties. The director also asked for information on who had previously been performing the duties of the market research analyst and their education level. In response, the petitioner submitted an organizational chart, list of staff schedule and duties and the hours of operation of along with photos of the office space where the beneficiary would perform the proffered position. The petitioner also asserted that the petitioner's owner, has been performing the duties of the market research analyst for the past five years and submitted copies of his resume and bachelor's degree.

The director determined that the evidence in the record did not demonstrate that the petitioner's business would support the need for a market research analyst given that it was not a new position and that the position had thus far been performed by an individual also working 35 hours as a cashier. In the August 2, 2012 decision, the director added that the petitioner is open 112 hours per week, but the information submitted indicates that one employee works 105 hours per week as a cashier, raising doubt about what position the beneficiary would actually perform. Therefore, the director concluded that the record does not establish that the petitioner intended to employ the beneficiary in the proffered position and thus a *bona fide* job offer does not exist.

On appeal, counsel states that the petitioner in the instant case, is comprised of two physical business locations. The petitioner states that the beneficiary will work at but will also serve as the market research analyst for It is noted that the petitioner in the instant case is the umbrella corporation under which the two different businesses are run. While the beneficiary's office would be located at there is no restriction on her ability to perform market research for both businesses which are all located in the same metropolitan statistical area.

On appeal, counsel submits an organizational chart and a staff schedule for two businesses, [3] Counsel asserts that as the businesses are open in excess of 180 hours a week, it is not unreasonable for to work 35 hours as a cashier and to work many more fulfilling the duties of a market research analyst. Counsel further alleges that the director's statement that one employee is reported as working 105 hours per week as a cashier at is factually incorrect. Counsel also submits an affidavit from asserting that as his business has grown, so has his need for someone with a higher level of expertise in marketing. states cites the example that the designation of counties in Alabama as "wet" or "dry" has a large influence on his business. adds that because of his preexisting business licensing, he is set-up to move quickly into dry counties that are becoming wet, and that as he expands into new locations, the market research to be performed by the beneficiary becomes more necessary.

Counsel also submits a letter from dated August 21, 2012. writes of success as a business man and his role in the community.

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[3] It is noted that in response to the director's RFE, the petitioner only submitted the staff schedule for

In addition, counsel submits a letter dated August 27, 2012, from assistant vice president, commenting on financial stability and expansion of his businesses.

Upon review of the record and the evidence submitted on appeal, the AAO finds that it is not unreasonable to conclude that could support a full-time market research analyst position, given the two businesses which fall under the umbrella and given expansion into new markets. Furthermore, the petitioner's size and industry alone do not determine whether or not a *bona fide* job offer exists. The director failed to identify inconsistencies in the record that would cause the service to doubt the veracity of the information submitted. Thus, the director's determination that the petitioner has failed to establish that a *bona fide* job exists, is withdrawn.

Beyond the decision of the director, the record does not establish that the petitioner had the ability to pay the prevailing wage or that the beneficiary had the required qualification as required by the labor certification. An application or petition that fails to comply with the technical requirements of the law may be denied by the AAO even if the Service Center does not identify all of the grounds for denial in the initial decision. *See Spencer Enterprises, Inc. v. United States*, 229 F. Supp. 2d 1025, 1043 (E.D. Cal. 2001), *aff'd*, 345 F.3d 683 (9th Cir. 2003); *see also Soltane v. DOJ*, 381 F.3d 143, 145 (3d Cir. 2004) (noting that the AAO conducts appellate review on a *de novo* basis).

With regard to the petitioner's ability to pay, the regulation at 8 C.F.R. § 204.5(g)(2) states:

> *Ability of prospective employer to pay wage.* Any petition filed by or for an employment-based immigrant which requires an offer of employment must be accompanied by evidence that the prospective United States employer has the ability to pay the proffered wage. The petitioner must demonstrate this ability at the time the priority date is established and continuing until the beneficiary obtains lawful permanent residence. Evidence of this ability shall be either in the form of copies of annual reports, federal tax returns, or audited financial statements. In a case where the prospective United States employer employs 100 or more workers, the director may accept a statement from a financial officer of the organization which establishes the prospective employer's ability to pay the proffered wage. In appropriate cases, additional evidence, such as profit/loss statements, bank account records, or personnel records, may be submitted by the petitioner or requested by the Service.

The priority date of the petition, which is the date the DOL accepted the labor certification for processing, was May 6, 2011. Thus, the petitioner must establish its continuing ability to pay as of 2011 onwards. Due to the timing of the filing of the ETA 9089 and the Form I-140 petition, the petitioner's 2011 tax returns were not yet due at the time the Form I-140 was filed. Therefore, the petitioner submitted a copy of its 2010 tax returns as evidence of ability to pay. The petitioner is structured as an S corporation and files Internal Revenue Service (IRS) Form 1120S. On the 2010 returns, the petitioner states that it paid $1,889 in wages and salaries. No cost of labor is reported.

As noted above, the petitioner reports having three employees. The incongruity between the number of employees the petitioner has and the amount of wages and salaries paid raises doubt about the veracity of the financial information submitted to the IRS and to USCIS. USCIS may not deny the petition based on the financial information pre-dating the priority date; however, this petition is not approvable absent the petitioner's submission of the required evidence of its ability to pay for 2011 onward.

The beneficiary must also meet all of the requirements of the offered position set forth on the labor certification by the priority date of the petition. 8 C.F.R. § 103.2(b)(l), (12). *See Matter of Wing's Tea House*, 16 I&N Dec. 158, 159 (Act. Reg. Comm. 1977); *see also Matter of Katigbak,* 14 I&N Dec. 45, 49 (Reg. Comm. 1971). In evaluating the labor certification to determine the required qualifications for the position, U.S. Citizenship and Immigration Services (USCIS) may not ignore a term of the labor certification, nor may it impose additional requirements. *See Madany v. Smith*, 696 F.2d 1008 (D.C. Cir. 1983); *K.R.K. Irvine, Inc. v. Landon*, 699 F.2d 1006 (9th Cir. 1983); *Stewart Infra-Red Commissary of Massachusetts, Inc. v. Coomey*, 661 F.2d 1 (1st Cir. 1981).

Where the job requirements in a labor certification are not otherwise unambiguously prescribed, e.g., by regulation, USCIS must examine "the language of the labor certification job requirements" in order to determine what the petitioner must demonstrate about the beneficiary's qualifications. *Madany*, 696 F.2d at 1015. The only rational manner by which USCIS can be expected to interpret the meaning of terms used to describe the requirements of a job in a labor certification is to "examine the certified job offer *exactly* as it is completed by the prospective employer." *Rosedale Linden Park Company v. Smith*, 595 F. Supp. 829, 833 (D.D.C. 1984)(emphasis added). USCIS's interpretation of the job's requirements, as stated on the labor certification must involve "reading and applying *the plain language* of the [labor certification]." *Id.* at 834 (emphasis added). USCIS cannot and should not reasonably be expected to look beyond the plain language of the labor certification or otherwise attempt to divine the employer's intentions through some sort of reverse engineering of the labor certification.

In the instant case, the labor certification states that the offered position requires a Master of Business Administration degree. The record contains a copy of the beneficiary's master's degree in business administration from the [redacted] awarded in December 2009. However, the copy has had text covered with liquid paper, which raises doubt as to the authenticity of the document. Doubt cast on any aspect of the petitioner's proof may, of course, lead to a reevaluation of the reliability and sufficiency of the remaining evidence offered in support of the visa petition. *Matter of Ho*, 19 I&N Dec. 582, 591-592 (BIA 1988).Moreover, the record does not include a copy of the beneficiary's transcript as required by 8 C.F.R. § 204.5(k)(3)(i)(B), which states that a request for this classification, advanced degree professional,) requires the submission of an "official academic record showing that the alien has a United States baccalaureate degree or a foreign equivalent degree."

Furthermore, on the Form G-325A submitted by the beneficiary in support of her application to adjust status to a permanent resident, the beneficiary states that she was a student at the [redacted]

from August 2009 to December 2009. It is unclear how the beneficiary would have completed her master's degree in four months (one semester). According to the website, "Well prepared students who have already satisfied all prerequisite work and who have career and/or family obligations may still be able to complete the MBA in 18-24 months. Full-time graduate students, however, (who have satisfied all prerequisite work) may be able to complete the program in 12 months." Therefore, the beneficiary's reported time in the program does not match the time commitment required to complete the program. It is incumbent on the petitioner to resolve any inconsistencies in the record by independent objective evidence, and attempts to explain or reconcile such inconsistencies, absent competent objective evidence pointing to where the truth, in fact, lies, will not suffice. *Matter of Ho*, 19 I&N Dec. at 591-592. As noted above, the omission of the beneficiary's transcripts precludes the AAO from making a positive determination about the beneficiary's qualifications. The petitioner failed to establish that the beneficiary met the minimum requirements of the offered position set forth on the labor certification as of the priority date. Therefore, the beneficiary does not qualify for classification as a member of the professions holding an advanced degree or an alien of exceptional ability pursuant to section 203(b)(2) of the Act, 8 U.S.C. § 1153(b)(2).

In view of the foregoing, the previous decision of the director will be withdrawn. The petition is remanded to the director for review and consideration of the additional issues that impact the petitioner's eligibility for the visa that were not initially identified by the director. The director may request any additional evidence considered pertinent. Similarly, the petitioner may provide additional evidence within a reasonable period of time to be determined by the director. Upon receipt of all the evidence, the director may review the entire record and enter a new decision. If the new decision is contrary to the AAO's findings, it should be certified to the AAO for review.

ORDER: The director's decision to deny the petition is withdrawn. The petition is remanded to the director for further action in accordance with the foregoing and entry of a new decision.